

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED

July 19, 2011

In the Matter of SWJC, Minor.

No. 303006

Ottawa Circuit Court

Family Division

LC No. 11-068253-AD

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Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child under § 39 of the Adoption Code, MCL 710.39. We affirm.

The child's mother considered placing the child up for adoption while she was pregnant, but did not file a petition at that time as permitted under MCL 710.34. Respondent knew that the mother was considering adoption, but did not file a notice of intent to claim paternity as permitted under MCL 710.33. After the child was born, the mother elected to proceed with adoption. Respondent contends that the conditions set forth in MCL 710.37 were required to be met before the court could proceed to the inquiry required under MCL 710.39, and because he was not "served with a notice of intent to release or consent in accordance with section 34(1), at least 30 days before the expected date of confinement specified in that notice," MCL 710.37(1)(c), termination was improper.

Respondent did not raise this issue below and it was not addressed by the trial court. Thus, this issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Therefore, "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), *aff'd* 480 Mich 19 (2008).

Except as provided in MCL 710.23d, if a child is born out of wedlock and the release or consent of the biological father cannot be obtained, the child cannot "be placed for adoption until the parental rights of the father are terminated by the court as provided in section 37 or 39 of this chapter, by the court pursuant to chapter XIIA, or by a court of competent jurisdiction in another state or country." MCL 710.31(1) (emphasis added). The word "or" is generally a disjunctive term, *People v Gatski*, 260 Mich App 360, 365; 677 NW2d 357 (2004), and "is generally construed as referring to an alternative or choice between two or more things." *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 69; 535 NW2d 529 (1995). Thus, termination may be ordered

under § 37 or § 39, and where termination is sought under § 39, the factors for termination under § 37 are irrelevant. This is supported by other provisions of the Adoption Code.

MCL 710.34 provides, in pertinent part:

In order to provide due notice at the earliest possible time to a putative father who may have an interest in the custody of an expected child or in the mother's intended release of an expected child for adoption or consent to adoption of the expected child, and in order to facilitate early placement of a child for adoption, a woman pregnant out of wedlock may file with the court an ex parte petition which evidences her intent to release her expected child for adoption or to consent to the child's adoption, which indicates the approximate date and location of conception and the expected date of her confinement, which alleges that a particular person is the putative father of her expected child, and which requests the court to notify the putative father about his rights to file a notice of intent to claim paternity pursuant to section 33. . . . The petition shall be verified. Upon the filing of the petition, the court shall issue a notice of intent to release or consent, which notice shall be served upon the putative father by any officer or person authorized to serve process of the court. Proof of service shall be filed with the court.

The use of the term "may" denotes permissiveness and is indicative of discretion. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007). Thus, a woman who is pregnant out of wedlock need not file a petition during her pregnancy and request that the court notify the putative father of his rights. This is supported by § 36, which requires that notice of the hearing be served on a putative father if he "*was not served* a notice of intent to release or consent at least 30 days before the expected date of confinement specified in the notice of intent to release or consent," MCL 710.36(3)(b) (emphasis added), and by § 37, which permits termination under certain circumstances where the father "*was timely served with a notice of intent to release or consent pursuant to section 34(1) or was served with . . . the notice of hearing required by section 36(3).*" MCL 710.37(1) (emphasis added). Specifically, termination may be ordered if:

- (a) The putative father submits a verified affirmation of his paternity and a denial of his interest in custody of the child.
- (b) The putative father files a disclaimer of paternity. For purposes of this section the filing of the disclaimer of paternity shall constitute a waiver of notice of hearing and shall constitute a denial of his interest in custody of the child.
- (c) The putative father was served with a notice of intent to release or consent in accordance with section 34(1), at least 30 days before the expected date of confinement specified in that notice but failed to file an intent to claim paternity either before the expected date of confinement or before the birth of the child.

(d) The putative father is given proper notice of hearing in accordance with section 36(3) or 36(5) but either fails to appear at the hearing or appears and denies his interest in custody of the child. [MCL 710.37(1).]

MCL 710.39 provides, in pertinent part:

(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

As the statutes make clear, notice under § 34 is only required if the mother files a petition before the child is born. If she does file the petition, the putative father receives the notice at least 30 days before the expected date of confinement, and the putative father does not respond to the notice by filing an intent to claim paternity, the putative father's parental rights can be terminated without further inquiry under MCL 710.37(1)(c). If the mother does not file a petition before the child is born and the father does not receive 30 days' notice and does not come within any of the other circumstances listed in § 37(1), then § 37 is simply inapplicable and termination is determined by the inquiry mandated by § 39. For example, in *In re Lang*, 236 Mich App 129; 600 NW2d 646 (1999), the putative father apparently was not served with a notice of the mother's intent to release or consent because the mother was deceased and her parents had petitioned for adoption. *Id.* at 130-131. This Court stated that § 37 was not applicable and that the trial court properly determined whether the respondent's parental rights should be terminated under § 39(1). *Id.* at 133 n 6, 135. Therefore, the circumstances listed in § 37 are not conditions precedent to termination under § 39. Accordingly, respondent has not shown plain error.

Affirmed.

/s/ David H. Sawyer  
/s/ William C. Whitbeck  
/s/ Donald S. Owens